Supreme Court, U.S.
FILED
05-928 JAN 23 200
OFFICE OF THE CLERK

No. _____

In The

# Supreme Court of the United States

MICHAEL WELP,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

JAMES R. WYRSCH
(*Counsel of Record*)
NATHAN J. OWINGS
WYRSCH HOBBS & MIRAKIAN, P.C.
1000 Walnut, Suite 1600
Kansas City, MO 64106
(816) 221-0080
*Attorneys for Petitioner*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Whether the Eighth Circuit incorrectly applied a plain error standard of review to Petitioner's pre-*Blakely*/*Booker* sentence when Petitioner specifically objected to a judicially found drug quantity and obstruction of justice enhancement under the Federal Sentencing Guidelines and when a plain error standard of review conflicts with the rulings of other circuit courts on this issue?

2. Whether a constitutional *Booker* error requires remand per se because such error can never be reviewed under a harmless error analysis as it is a defect which effects the framework in which a trial proceeds and is therefore structural error?

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | 1 |
| STATEMENT OF JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE PETITION | 5 |
| I. THE EIGHTH CIRCUIT INCORRECTLY APPLIED A PLAIN ERROR STANDARD OF REVIEW BECAUSE CIRCUIT PRECEDENT PRIOR TO THE BLAKELY/BOOKER DECISIONS PRECLUDED OBJECTIONS ON SIXTH AMENDMENT GROUNDS AS "FRIVOLOUS" AND THE PLAIN ERROR STANDARD IS IN CONFLICT WITH OTHER CIRCUIT COURTS | 5 |
| A. Plain Error Standard of Review | 5 |
| B. Circuit Split | 8 |
| II. A CONSTITUTIONAL BOOKER ERROR IS STRUCTURAL IN NATURE BECAUSE SUCH ERROR IS A DEFECT EFFECTING THE FRAMEWORK IN WHICH THE TRIAL PROCEEDS AND THE HARMLESS ERROR DOCTRINE IS LIMITED TO BOOKER CASES NOT INVOLVING A SIXTH AMENDMENT VIOLATION | 11 |
| CONCLUSION | 15 |

## TABLE OF AUTHORITIES

Page

CASES:

*Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000) ..... 5, 6, 12

*Arizona v. Fulminante*, 111 S. Ct. 1246 (1991) ..... 12

*Blakely v. Washington*, 124 S. Ct. 2531 (2004) ..... *passim*

*Ring v. Arizona*, 122 S. Ct. 2428 (2002) ..... 5

*State of Washington v. Recuenco*, 126 S. Ct. 478 (2005) ..... 12

*Sullivan v. Louisiana*, 113 S. Ct. 2079 (1993) ..... 13

*United States v. Alvarez*, 320 F.3d 765 (8th Cir. 2002) ..... 7

*United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) ..... 10

*United States v. Antonakopolous*, 399 F.3d 68 (1st Cir. 2005) ..... 9, 12

*United States v. Banks*, 340 F.3d 683 (8th Cir. 2003) ..... 7

*United States v. Booker*, 125 S. Ct. 738 (2005) ..... *passim*

*United States v. Coffey*, 395 F.3d 856 (8th Cir. 2005), *aff'd*, 415 F.3d 882 (8th Cir. 2005) ..... 7

*United States v. Coles*, 403 F.3d 764 (D.C. Cir. 2005) ..... 10

*United States v. Cotton*, 122 S. Ct. 1781 (2002) ..... 8

*United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005) ..... 10

*United States v. Davis*, 407 F.3d 162 (3rd Cir. 2005) ..... 10

*United States v. Diaz*, 296 F.3d 680 (8th Cir. 2002), *cert. denied*, 537 U.S. 940 (2002) ..... 7

TABLE OF AUTHORITIES – Continued

Page

*United States v. Dowlin*, 408 F.3d 647 (10th Cir. 2005) ..... 12

*United States v. Fields*, 408 F.3d 1536 (11th Cir. 2005) ..... 9

*United States v. Fox*, 396 F.3d 1018 (8th Cir. 2005) ..... 7

*United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. 2005) ..... 12, 15

*United States v. Hamm*, 400 F.3d 336 (6th Cir. 2005) ..... 10

*United States v. Henry*, 408 F.3d 930 (7th Cir. 2005) ..... 10

*United States v. Leisure*, 412 F.3d 857 (8th Cir. 2005) ..... 9

*United States v. Mares*, 402 F.3d 511 (5th Cir. 2005) ..... 8

*United States v. Olano*, 113 S. Ct. 1770 (1993) ..... 8

*United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005) ..... 10, 11

*United States v. Piggie*, 316 F.3d 789 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 157 (2003) ..... 7

*United States v. Pirani*, 406 F.3d 543 (8th Cir. 2005) ..... 6, 7, 8, 9

*United States v. Rodriguez*, 398 F.3d 1291 (11th Cir.), *cert. denied*, 125 S. Ct. 2935 (2005) ..... 8, 10

*United States v. Sdoulam*, 398 F.3d 981 (8th Cir. 2005) ..... 7

*United States v. Selwyn*, 398 F.3d 1064 (8th Cir. 2005) ..... 7

TABLE OF AUTHORITIES – Continued

Page

STATE CASES

*State v. Allen*, 615 S.E.2d 256 (N.C. 2005), *citing Neder v. United States*, 119 S. Ct. 1827 (1999).... 13, 14, 15

*State v. Hughes*, 110 P.3d 192 (Wash. 2005) ..... 12, 13, 15

*State v. Recuenco*, 110 P.3d 188 (Wash. 2005)..... 12, 15, 16

FEDERAL STATUTES

18 U.S.C. § 3231 ..... 2

21 U.S.C. § 841(c)(2)..... 2, 4

28 U.S.C. § 1254(1)..... 1

U.S.S.G. § 2D1.11 (2004)..... 4

U.S.S.G. § 3C1.1 (2004)..... 4, 7

MISCELLANEOUS

Supreme Court Rule 13.1..... 1

Supreme Court Rule 13.3..... 1

## PETITION FOR WRIT OF CERTIORARI

Michael Welp respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

## OPINIONS BELOW

The opinion in the Court of Appeals for the Eighth Circuit affirming the sentence of the District Court was issued per curiam on October 25, 2005, and is reprinted in the Appendix hereto at App. 1-3.

## STATEMENT OF JURISDICTION

The Court of Appeals for the Eighth Circuit entered its judgment on October 25, 2005. App. at 4. Petitioner did not file a petition for rehearing in the Eighth Circuit. The present petition for writ of certiorari is timely filed pursuant to Supreme Court Rules 13.1 and 13.3. This Honorable Court has jurisdiction under 28 U.S.C. § 1254(1) to grant a petition for writ of certiorari, filed by a party to a federal criminal case, to review the judgment of a federal court of appeals.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution which reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## STATEMENT OF THE CASE

Petitioner was indicted on July 21, 2003 for the single count of knowingly and intentionally distributing and possessing with the intent to distribute pseudoephedrine in violation of 21 U.S.C. § 841(c)(2).[1] The indictment consisted of a single sentence that did not allege or quantify the amount of pseudoephedrine, or allege the defendant would be subject to any enhancements under Chapter 3 of the United States Sentencing Guidelines ("U.S.S.G."). The trial commenced on October 2, 2003. The district court had proper jurisdiction pursuant to 18 U.S.C. § 3231, which provides that the district courts shall have original jurisdiction of "all offenses against the laws of the United States."

The evidence at trial indicated that the Petitioner had been identified as a supplier of pseudoephedrine pills to

[1] The source for the Statement of the Case is Petitioner's brief on appeal unless there are citations to the Appendix attached to this Petition.

one Ryan Buchheim, a cooperating individual who provided the Petitioner's name to law enforcement. An undercover law enforcement officer initially met with Petitioner on March 13, 2003, and arranged a purchase of pseudoephedrine from Petitioner at a later date. The undercover officer bought a sample bottle and agreed to buy an additional 71 bottles of pseudoephedrine for $1,200.00 from Petitioner. Petitioner met with the officer that day and sold the 72 bottles containing approximately 255.6 grams of pseudoephedrine. The agent indicated at that meeting that he was going to "make some shit."

Later that same day, the undercover agent made another call to Petitioner and arranged a third meeting at which Petitioner was to deliver an additional 144 bottles of pseudoephedrine containing approximately 518 grams of the drug. The Petitioner was arrested when delivering these drugs. A search warrant was executed at the Petitioner's home where he resided with his family and more pseudoephedrine was found. Petitioner also admitted he had more pseudoephedrine located at a warehouse used by his father's business, Jim's Foods, who Petitioner was an employee of, and also used by NS Distributing, the Petitioner's distribution company. Invoices at the warehouse indicated that the pseudoephedrine seized was bought through the above businesses.

The cooperating witness in the case, Mr. Buchheim, testified at trial that he was arrested in possession of 2,887 pills and that he had a safe containing 39,000 pseudoephedrine pills. Mr. Buchheim testified that he obtained all of the pills from Petitioner. An undercover agent testified Petitioner told him he knew what the pseudoephedrine was used for.

The jury returned a verdict of guilty on October 3, 2003 utilizing separate verdict forms for whether the Defendant distributed pseudoephedrine knowingly or having reasonable cause to believe it would be used to manufacture methamphetamine and whether the Defendant possessed pseudoephedrine with such knowledge in violation of 21 U.S.C. § 841(c)(2).

The first sentencing hearing was held on May 11, 2004. Prior to the hearing, Petitioner filed his Sentencing Brief, attached hereto as Appendix Pages 15-35. The Sentencing Brief made specific objections to the amount of pseudoephedrine used in determining Petitioner's base offense level. App. at 15-23. An objection was also made to an obstruction of justice enhancement. App. at 20. Petitioner objected to the calculation of the base offense level as a violation of due process of law. App. at 15.

The court held a second sentencing hearing on June 4, 2004. At the second sentencing hearing the judge found the relevant quantity to be 2.8 kilograms resulting in a base offense level of 36 under U.S.S.G. § 2D1.11 (2004). App. at 36-37. The quantities included the purchases from the undercover officers which amounted to 345.6 grams. *Id.* Also included were pills from Ryan Buchheim which included an amount of 173.22 grams from prior deliveries and an amount of 2321.10 grams taken from Mr. Buchheim's home safe. *Id.* Petitioner objected to all of these amounts. App. at 15-23. The judge further found a two-level enhancement under U.S.S.G. § 3C1.1 (2004) for obstruction of justice, increasing Petitioner's base offense level to 38. App. at 37-38. Petitioner was a criminal history category I, which resulted in a sentencing range of 235-293 months. The statutory maximum for the crime charged was 240 months resulting in an effective range for Petitioner of

235-240 months. Petitioner, a first-time offender, was sentenced to 235 months, the low end of the guideline range.

Petitioner appealed to the Eighth Circuit challenging the court's determination of drug quantity and the application of the enhancement for obstruction of justice under *Blakely v. Washington,* 124 S. Ct. 2531 (2004). Petitioner filed his brief on January 4, 2005, approximately one month prior to the decision of this Court in *United States v. Booker*, 125 S. Ct. 738 (2005). The Eighth Circuit affirmed Petitioner's sentence on October 25, 2005. App. at 1.

## REASONS FOR GRANTING THE PETITION

### I. THE EIGHTH CIRCUIT INCORRECTLY APPLIED A PLAIN ERROR STANDARD OF REVIEW BECAUSE CIRCUIT PRECEDENT PRIOR TO THE *BLAKELY/BOOKER* DECISIONS PRECLUDED OBJECTIONS ON SIXTH AMENDMENT GROUNDS AS "FRIVOLOUS" AND THE PLAIN ERROR STANDARD IS IN CONFLICT WITH OTHER CIRCUIT COURTS.

#### A. Plain Error Standard of Review

Petitioner submitted his brief in the Eighth Circuit relying on the principles announced by this Court in *Blakely v. Washington,* 124 S. Ct. 2531 (2004), *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), and *Ring v. Arizona*, 122 S. Ct. 2428 (2002), which stated that a defendant may not have his sentence increased by facts not admitted by him or found beyond a reasonable doubt by a jury. Subsequent to the submission of Petitioner's brief to the Court of

Appeals on January 4, 2005, this Court entered its decision in *United States v. Booker*, 125 S. Ct. 738 (2005), making the United States Sentencing Guidelines advisory due to inherent flaws that violated a defendant's Sixth Amendment rights.

In its per curiam decision, the Eighth Circuit stated that the District Court "sentenced Welp based in part on facts found by a preponderance of the evidence and applying the Guidelines in a mandatory fashion which was error under *United States v. Booker*, 125 S. Ct. 738 (2005)." App. at 2. The Eighth Circuit then utilized the plain error standard of review to deny relief. App. at 2. This ruling is consistent with other Eighth Circuit cases which have held that a failure to make a very specific objection to the mandatory nature of the Sentencing Guidelines, or a specific Sixth Amendment challenge in the district court, results in a plain error standard of review. *See United States v. Pirani*, 406 F.3d 543, 550-52 (8th Cir. 2005) (en banc). Petitioner suggests that this was the improper standard of review in light of circuit precedent prior to *Blakely v. Washington, supra*, and in light of the rulings of other circuit courts in the aftermath of *United States v. Booker, supra*.

It is not reasonable to require a criminal defendant to make a specific *Booker/Blakely* type of objection prior to the issuance of either opinion. At the time Petitioner was sentenced, such an objection was entirely contrary to circuit precedent. The clear and unambiguous law in the Eighth Circuit before the *Booker* and *Blakely* holdings was that this Court's ruling in *Apprendi, supra*, did not apply to the Sentencing Guidelines calculations and enhancements. In fact, the Eighth Circuit described the *Apprendi* argument that a sentencing court could not judicially find